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IN THE

Supreme Court of the United States

October Term, 1969
No. 1133

EARL LARSEN KESLER,

Petitioner,

vs.

Department of Motor Vehicles
~~THE SUPREME COURT OF THE~~ STATE OF CALIFORNIA,

Respondent.

Petition for Writ of Certiorari to the Supreme Court of the State of California.

HYMAN GOLD,
9171 Wilshire Boulevard,
Beverly Hills, Calif. 90210,
(213) 276-1344,
Attorney for Petitioner.

Parker & Son, Inc., Law Printers, Los Angeles. Phone 685-9790.

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Petition for Writ of Certiorari to the Supreme Court of the State of California.

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

Petitioner, Earl Larsen Kesler, respectfully prays that a Writ of Certiorari issue to review the judgment of the Supreme Court of the State of California, wherein on October 31, 1969 that court reversed a judgment of the Superior Court of Los Angeles County granting a peremptory writ of mandate to vacate an order of the Department of Motor Vehicles suspending petitioner's driver's license. The Honorable Justice Peters of the California Supreme Court dissented and wrote a separate opinion in support of his dissent. The judgment and opinion and the dissent thereto are a part of the record herein. (Appendix A.)

Opinions Below.

1. The Superior Court of Los Angeles County, wherein a judgment was rendered on behalf of and in favor of your petitioner, granting a writ of mandate ordering the Department of Motor Vehicles to set aside their order suspending petitioner's driver's license. The judgment and Reporter's Transcript thereof are a part of the record herein. Judgment was entered July 17, 1967 (Entitled Reporter's Transcript on Appeal to wit, Reporter's Transcript of Proceedings May 24, 1967.)

2. The Court of Appeal of the State of California, Second Appellate District, to which Respondent below, *i.e.*, State of California, Department of Motor Vehicles, *et al.*, had appealed, and petitioned for rehearing, said petition for rehearing being denied on May 5, 1969. The opinion of said Court of Appeal, which affirmed the judgment and opinion of the Superior Court below, was rendered on April 7, 1969.

3. The Supreme Court of the State of California, and a dissenting opinion thereto, which court reversed the judgment of the Superior Court of Los Angeles County. This judgment and opinion and also the dissenting opinion are a part of the record herein being certified to this Honorable Court. This opinion was entered October 31, 1969.

The Supreme Court of the State of California is the highest state court in California. We have exhausted our remedies in the state courts of California.

Grounds on Which the Jurisdiction of This Court Is Invoked.

1. The judgment sought to be reviewed is the one rendered by the Supreme Court of the State of California, dated and entered October 31, 1969.

2. The statutory provisions believed to confer jurisdiction on the Supreme Court of the United States to review the judgment in question are:

The 5th Amendment of the United States Constitution.

The 6th Amendment of the United States Constitution.

The 14th Amendment of the United States Constitution.

Question Presented for Review.

An important and substantial question exists in which an issue of general importance is involved. That is, *are fundamental rules of fairness of an accused violated when a police officer fails to advise him of his rights regarding the taking of chemical sobriety tests in the following circumstances.*

A citizen of a state, otherwise qualified, is given a driver's license to operate a motor vehicle by the state. The state, in attempting to curb intoxicated drivers from driving, enacts several laws, ostensibly to determine for later court evidentiary purposes the amount of alcohol in the driver's blood. Many states presently have such laws enacted and operative.

Here we have two statutes involved.

(1) A requirement that a police officer may require a suspected intoxicated driver to submit

to one of three tests: A blood test, a breath test, or an urine test. If the person refuses to do so, the state revokes his driver's license—for that alone—for six months. The law requires the officer to advise the arrestee of this result if he fails to submit to a test. (Calif. Vehicle Code § 13353.)

(2) The very next section of the Vehicle Code, § 13354(b) provides that the person tested may at his own expense administer additional tests by a person of his own choosing. Nothing is stated here about informing the accused of this right by the police officer.

In our factual situation the petitioner was arrested for driving while under the influence of intoxicating liquor. The police officer asked him to take one of these three tests. Petitioner stated he would take all three tests—or none. He was perfectly willing to take all three tests, but did not trust the result of just one test. He was informed that his not taking one of the tests would be interpreted as a refusal to take any, and as a consequence he would lose his driver's license for 6 months.

Nothing was stated to him regarding his right to take the other tests at his own expense. His license was taken away.

The Superior Court granted a writ of mandate requiring the Department of Motor Vehicles to return his license, on the grounds that: this conduct did not constitute a "refusal" to take a test, and that the officer should haye advised him of his right to take further tests at his own expense, in light of these circumstances.

The Court of Appeals affirmed this decision on April 7, 1969.

On October 31, 1969 the Supreme Court of the State of California reversed this Superior Court ruling and ordered the setting aside of the writ of mandate.

The Questions Presented for Review Before This Honorable Court Are Therefore:

Is there a violation of the fundamental rules of fairness to an accused under these circumstances; and secondy, does it constitute a "refusal" for an accused to fail to select and submit to one of the three tests in this circumstance. In other words, is there a denial of due process of law hereunder, as guaranteed by the Fifth, Sixth and Fourteenth Amendments of the United States Constitution.

Further, does § 13353(b) violate the Fourteenth and Fifth Amendments of the United States Constitution by coercing a person to testify against himself, under penalty of loss of his driving license if he refuses to take a test.

Constitutional Provisions and Statutes Involved.

The Fourteenth Amendment of the United States Constitution, which provides a guarantee of due process of law, and assures federal protection against state action with respect to rights protected by the *Fifth and Sixth Amendments to the Constitution of the United States.*

U.S.C.A. Const. Amends. 5, 6, 14;

The Fifth and Sixth Amendments to the Constitution of the United States;

Cox v. Burke, 361 F. 2d 183, certiorari denied. 87 S. Ct. 304, 385 U.S. 939, 17 L. Ed. 2d 218;

Alford v. State of N.C., 405 F. 2d 340, 22 L. Ed. 2d 558;

Schatte v. International Alliance of Theatrical State Emp. and Moving Picture Operators of United States and Canada, 70 F. Supp. 1008, affirmed 165 F. 2d 216, certiorari denied 68 S. Ct. 1018, 334 U.S. 812, 92 L. Ed. 1743.

California Vehicle Code § 13353;

Implied Consent for Chemical Test

13353. (a) Any person who drives a motor vehicle upon a highway shall be deemed to have given his consent to a chemical test of his blood, breath or urine for the purpose of determining the alcoholic contest of his blood if lawfully arrested for any offense allegedly committed while the person was driving a motor vehicle under the influence of intoxicating liquor. The test shall be incidental to a lawful arrest and administered at the direction of a peace officer having reasonable cause to believe such person was driving a motor vehicle upon a highway while under the influence of intoxicating liquor. Such person shall be told that his failure to submit to such a chemical test will result in the suspension of his privilege to operate a motor vehicle for a period of six months.

The person arrested shall have the choice of whether the test shall be of his blood, breath or urine. . . .

(b) If any such person refuses the officer's request to submit to a chemical test, the department, upon receipt of the officer's sworn statement that he had reasonable cause to believe such person had

been driving a motor vehicle upon highway while under the influence of intoxicating liquor and that the person had refused to submit to the test after being requested by the officer, shall suspend his privilege to operate a motor vehicle for a period of 6 months. . . .

California Vehicle Code § *13354(b);*

(b) The person tested may, at his own expense, have a physician, registered nurse, duly licensed clinical laboratory technologist or clinical laboratory ( )[2] *bioanalyst* or any other person of his own choosing administer a test, in addition to any administered at the direction of a peace officer, for the purpose of determining the amount of alcohol in his blood at the time alleged as shown by chemical analysis of his blood, breath or urine. The failure or inability to obtain an additional test by a person shall not preclude the admissibility in evidence of the test taken at the direction of a peace officer.

Statement of the Case.

The petitioner was *arrested for driving while under the* influence of intoxicating liquor. Pursuant to Vehicle Code section 13353,[1] petitioner was informed by

[1]Section 13353 provides in pertinent part: "(a) Any person who drives a motor vehicle upon a highway shall be deemed to have given his consent to a chemical test of his blood, breath or urine for the purpose of determining the alcoholic content of his blood if lawfully arrested for any offense allegedly committed while the person was driving a motor vehicle under the influence of intoxicating liquor. The test shall be incidental to a lawful arrest and administered at the direction of a peace officer having reasonable cause to believe such person was driving a motor vehicle upon a highway while under the influence of intoxicating

(This footnote is continued on the next page)

the arresting officer "that he had a choice of three chemical tests and that he should submit to one or the other, and that a denial or negative reply constituted a refusal to take a test." Petitioner was further advised that if he refused to take a test, his driver's license would be suspended. *However, petitioner refused to submit to only a single test, stating that he wanted to take all three tests in order to obtain an "average" of these tests.* Petitioner told the arresting officer that a single test would not be "scientifically conclusive."

The arresting officer then informed petitioner that under the law he had a choice of one of three tests, but not all three as a choice, and that his continued, insistence upon all three tests would be treated as a refusal to submit to a test. Petitioner remained adamant, and the arresting officer prepared an affidavit of refusal pursuant to section 13353.

Acting upon the affidavit, the Department of Motor Vehicles suspended Petitioner's license for a period of six months. The superior court granted petitioner's petion for writ of mandate on the grounds that petitioner's request to take all three tests did not constitute a refusal to submit to a test under section 13353, and

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liquor. Such person shall be told that his failure to submit to such a chemical test will result in the suspension of his privilege to operate a motor vehicle for a period of six months.

"The person arrested shall have the choice of whether the test shall be of his blood, breath or urine.

". . .

"(b) If any such person refuses the officer's request to submit to a chemical test, the department, upon receipt of the officer's sworn statement that he had reasonable cause to believe such person had been driving a motor vehicle upon a highway while under the influence of intoxicating liquor and that the person had refused to submit to the test after being requested by the officer, shall suspend his privilege to operate a motor vehicle for a period of six months. . . ."

that petitioner should have been advised by the arresting officer that petitioner had the right, under Vehicle Code section 13354, subdivision (b),[2] to obtain an additional test at his own expense. (from Opinion of Supreme Court of California, pages 1, 2, 3.)

This was sustained by the California Court of Appeal on April 7, 1969.

On Oct. 31, 1969, the California Supreme Court upset this opinion and ordered a dissolution of the Writ of Mandate. (Opinion of California Supreme Court, attached hereto as Appendix A.)

Reasons for Granting the Writ and Argument Amplifying Same.

A national problem exists in that many states today have attempted to curb the problem of drunk driving and have enacted legislation similar to those of California to affectuate this goal. This is common knowledge. The social problem of drunk driving is a serious one and legislation of this nature is undoubtedly necessary. In the zeal of enforcing these laws care must be taken not to abrogate the basic rights of the individual. These rights are protected by the Constitutional Amendments enumerated above.

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[2]Section 13354, subdivision (b) provides: "(b) The person tested may, at his own expense, have a physician, registered nurse, duly licensed clinical laboratory technologist or clinical laboratory bioanalyst or any other person of his own choosing administer a test, in addition to any administered at the direction of a peace officer, for the purpose of determining the amount of alcohol in his blood at the time alleged as shown by chemical analysis of his blood, breath or urine. The failure or inability to obtain an additional test by a person shall not preclude the admissibility in evidence of the test taken at the direction of a peace officer."

The right to drive an automobile is an important and often necessary one. This is particularly true in the western part of the United States and in areas outside of the large cities, where public transportation is not adequate or where one's job depends upon driving. At the same time society has a right to be protected from irresponsible and drunk drivers. In doing this however safeguards of personal rights of the individual must be protected. Basic protection is granted to the individual in safeguarding these rights by the 14th Amendment of the Constitution of the United States against state and federal invasions thereof.

U.S.C.A. Constitutional Amendments, 5, 14;
Schatte v. International Alliance of Theatrical Stage Employees & Motion Picture Operators of U.S. and Canada, 70 F. Supp. 1008, Affirmed, 165 F. 2d 216, Certiorari denied 68 S. Ct. 1018, 334 U.S. 812, 92 L. Ed. 1743.

The Due Process clause of the 14th Amendment requires that action by the state through any of its agencies must be consistent with fundamental principles of liberty and justice.

Shield v. Beto, 370 F. 2d 1003,
U.S. ex rel. Weber v. Ragen, 176 F. 2d 579 (1949), Certiorari dismissed 70 S. Ct. 338, 94 L. Ed. 489.

As is stated by Justice Peters in his dissent in the Supreme Court decision:

"Kesler v. Department of Motor Vehicles L.A.

DISSENTING OPINION BY PETERS, J.

I dissent.

Even if a demand to take all three tests be interpreted as a refusal to take any, under the law he could have agreed to take one, and could have demanded the right to take the other two if he paid for them (Veh. Code, § 13354, subd. (b)). The arresting officer should have informed petitioner of that right. Petitioner had made it perfectly clear that he wanted all three tests. The only way he could get them was to pay for two. The police officer presumably knew this. He knew or should have known that petitioner did not. Fundamental rules of fairness require that the officer inform him of those rights.

PETERS, J."

The concern of Due Process is fundamental fairness.

Cox v. Burke, 361 F. 2d 183, Certiorari denied, 87 S. Ct. 304, 385 U.S. 939, 17 L. Ed. 2d 218.

Fairness is a requisite of Due Process.

Petition of Wright, 282 F. Supp. 999.

I am in strong accord with Justice Peters' view that basic rules of fairness were violated by not informing petitioner of his rights.

Secondarily, in our situation an individual is being deprived of a right to drive a vehicle by virtue of merely declining to take a test for sobriety—this loss of right is without court process to determine his sobriety or otherwise. It is not a question of obtaining evidence to be used in court later, but of a loss of an important right *instanter.*

I feel this is violative of the 5th and 6th Amendments of the Constitution of the United States in that it coerces an individual to "testify" against himself under penalty of losing his rights.

The provisions of the 5th and 6th Amendments of the Federal Constitution are made mandatory upon the states by the 14th Amendment.

U.S.C.A. Const., Amendments, 5, 6, 14;
Goodwin v. Page, 296 F. Supp. 1202.

The 14th Amendment outlaws coerced guilty pleas in State prosecutions.

U.S.C.A. Const. Amendment 14;
Alford v. State of N. C., (1968) 405 F. 2d 340, 22 L. Ed. 2d 558.

Conclusion.

The petition for Writ of Certiorari should be granted.

Respectfully submitted,

HYMAN GOLD,
Attorney for Petitioner.

APPENDIX A.

Opinion of the Court of Appeal.

In the Supreme Court of the State of California, in Bank.

Earl Larsen Kesler, Petitioner and Respondent, v. Department of Motor Vehicles, State of California, Defendant and Appellant. L.A. 29655.

Filed Oct. 31, 1969.

The Department of Motor Vehicles (Department) appeals from a judgment of the Superior Court of Los Angeles County granting a peremptory writ of mandate to vacate an order suspending respondent's driver's license. We have concluded that the order of the Department was correct and the judgment of the superior court should be reversed.

Respondent was lawfully arrested for driving while under the influence of intoxicating liquor. Pursuant to Vehicle Code section 13353,[1] respondent was informed

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[1]Section 13353 provides in pertinent part: "(a) Any person who drives a motor vehicle upon a highway shall be deemed to have given his consent to a chemical test of his blood, breath or urine for the purpose of determining the alcoholic content of his blood if lawfully arrested for any offense allegedly committed while the person was driving a motor vehicle under the influence of intoxicating liquor. The test shall be incidental to a lawful arrest and administered at the direction of a peace officer having reasonable cause to believe such person was driving a motor vehicle upon a highway while under the influence of intoxicating liquor. Such person shall be told that his failure to submit to such a chemical test will result in the suspension of his privilege to operate a motor vehicle for a period of six months.

"The person arrested shall have the choice of whether the test shall be of his blood, breath or urine.

". . .

"(b) If any such person refuses the officer's request to submit to a chemical test, the department, upon receipt of the officer's sworn statement that he had reasonable cause to believe such

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by the arresting officer "that he had a choice of three chemical tests and that he should submit to one or the other, and that a denial or negative reply constituted a refusal to take a test." Respondent was further advised that if he refused to take a test, his driver's license would be suspended. However, respondent refused to submit to only a single test, stating that he wanted to take all three tests in order to obtain an "average" of these tests. Respondent told the arresting officer that a single test would not be "scientifically conclusive."

The arresting officer then informed respondent that under the law he had a choice of one of three tests, but not all three as a choice, and that he continued insistence upon all three tests would be treated as a refusal to submit to a test. Respondent remained adamant, and the arresting officer prepared an affidavit of refusal pursuant to section 13353.

Acting upon the affidavit, the Department of Motor Vehicles suspended respondent's license for a period of six months. The superior court granted respondent's petition for writ of mandate on the grounds that respondent's request to take all three tests did not constitute a refusal to submit to a test under section 13353, and that respondent should have been advised by the arresting officer that respondent had the right, Vehicle Code section 13354, subdivision (b),[2] to obtain an additional test at his own expense.

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person had been driving a motor vehicle upon a highway while under the influence of intoxicating liquor and that the person had refused to submit to the test after being requested by the officer, shall suspend his privilege to operate a motor vehicle for a period of six months. . . ."

[2]Section 13354, subdivision (b) provides: "(b) The person tested may, at his own expense, have a physician, registered nurse, duly licensed clinical laboratory technologist or clinical

In order to resolve this matter, we must decide two separate issues: first, whether respondent's insistence upon all three tests constituted, in legal effect, a refusal to submit to a test within the meaning of section 13353 and second, if it did constitute such a refusal, whether or not that refusal may be excused by reason of the failure to advise respondent of his right to obtain an additional test at his own expense.

We have concluded that section 13353 neither expressly nor by necessary implication permits one to insist that all three tests be administered to him at the state's expense. Section 13353 refers to the administration of "a chemical test," and states quite clearly "The person arrested shall have the choice of whether the test shall be of his blood, breath *or* urine." (Italics added.) Had the Legislature intended to permit a choice of more than one test, we believe that it would have expressly so provided.

A court should interpret legislation reasonably and should attempt to give effect to the apparent purpose of the statute. Our implied consent statute, including section 13353, was enacted to fulfill the need for a fair, efficient and accurate system of detection and prevention of drunken driving. (*People v. Sudduth*, 65 Cal. 2d 543, 546; *Zidell v. Bright*, 246 Cal.App.2d 867.) The immediate purpose of section 13353 is to obtain the best evidence of blood alcohol content at the time of the

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laboratory bioanalyst or any other person of his own choosing administer a test, in addition to any administered at the direction of a peace officer, for the purpose of determining the amount of alcohol in his blood at the time alleged as shown by chemical analysis of his blood, breath or urine. The failure or inability to obtain an additional test by a person shall not preclude the admissibility in evidence of the test taken at the direction of a peace officer."

arrest of a person reasonably believed to be driving while intoxicated. The long range purpose is, of course, to inhibit intoxicated persons from driving on the highways. (*Zidell v. Bright, supra,* at pp. 869-870.)

Whether the purposes of the implied consent statute would be more fairly, efficiently or accurately attained by the revision of section 13353 to permit a choice of all three tests instead of only one is a matter for the Legislature. As the section now reads provision is made only for a choice of one of three tests. Consequently, we hold that respondent's insistence upon taking all three rather than only one constituted, at best, a conditional consent to a test which, under the authorities, must be deemed to be a refusal to submit to a test within the meaning of section 13353 and similar to the conditions held to nullify the consent in *Finley v. Orr,* 262 Cal.App.2d 656, 667 (that licensee's physician or attorney be present during the test); *Fallis v. Depart. of Motor Vehicles,* 264 Cal.App.2d 373, 382 (that licensee's physician administer the test); *Ent v. Department of Motor Vehicles,* 265 Cal.App.2d 936 (that licensee's attorney be present during test); *Westmoreland v. Chapman,* 268 A.C.A. 855 (that licensee's physician be present during, or administer the test).

The instant case is to be distinguished from *James v. State of California,* 267 A.C.A. 837, wherein the arrested driver indicated his willingness to take any test administered to him, but simply refused to select a particular test to take. In *James,* the Court of Appeal held that given a willingness to submit to a test, a mere refusal to indicate a choice did not constitute a refusal to take a test under section 13353. This result seems proper, as section 13353 does not by its terms require

the arrested person to select a particular test himself. In the instant case, respondent refused to take only a single test and instead insisted upon taking all three, a right not conferred upon him under section 13353.

Nor does *Rust v. Department of Motor Vehicles,* 267 A.C.A. 602, improve respondent's position. In *Rust,* the arresting officer gave the driver an overly broad *Miranda* warning concerning his right to counsel, without explaining its inapplicability to the blood alcohol test. Since the driver may have been misled by the officer, the Court of Appeal held that the driver's insistence upon calling his attorney before the test was given did not constitute a refusal to submit to a test under section 13353. There is no indication in the record before us that respondent herein was similarly misled regarding his rights.

Turning to the second question of whether or not respondent's refusal may be executed by reason of the failure of the arresting officer to advise respondent that he could obtain an additional test at his own expense, pursuant to section 13354, subdivision (b), we note that neither section 13353 nor section 13354 purports to require the arresting officer to advise the driver that an additional test is available at his expense. Other than the *Miranda* warning prior to police interrogation, section 13353, subdivision (a), specifies the only warning required to be given, namely, that the driver "be told that his failure to submit to such a chemical test will result in the suspension of his privilege to operate a motor vehicle for a period of six months." Therefore, we may reasonably conclude that the Legislature did not intend to impose the further requirement that the arresting officer advise the driver of the availability

of an additional test at his own expense. (Accord, *Westmoreland v. Chapman, supra,* 268 A.C.A. 855.)

Nor do we believe that principles of due process or equity require that persons in respondent's position be advised by law enforcement officers that additional tests may be taken at their own expense. As we have previously stated in *In re Koehne,* 54 Cal.2d 757, 759, and in *In re Newbern,* 55 Cal.2d 508, 511, all that due process requires in the preservation of the rights of such persons is the availability of an opportunity for defendant to obtain a timely sampling of his blood in the manner required by law. Respondent was given that opportunity, and he voluntarily refused it.

In *In re Koehne, supra,* 54 Cal.2d 757, involving a person charged with being drunk in a public place and who insisted that the police denied him the right to call and obtain the sevices of a physician to test the alcoholic content of his blood, we stated that it is significant "that the law does not impose upon law enforcement agencies the requirement that they take the initiative, *or even any affirmative action,* in procuring the evidence deemed necessary to the defense of the accused. Rather it is the accused who must act to protect his interests, and it is onoy when he is denied an opportunity, reasonable under the circumstances, to procure a timely sample of his blood that he can properly claim a denial of due process." (Italics added.)

Respondent asks us to hold that law enforcement officers must indeed take the initiative and act affirmatively to advise the arrested driver that he may obtain additional tests at his own expense. Such a holding would be contrary to the principles announced by us in *Koehne* and *Newbern, supra,* and to the legislative in-

tent necessarily implied from the fact of sections 13353 and 13354.

Accordingly, we hold that respondent's refusal to submit to a chemical test to determine the alcoholic content of his blood was unjustified and in violation of section 13353 of the Vehicle Code. The judgment is reversed and the superior court is directed to make new findings and enter judgment in accordance with the views expressed herein.

Burke, *J.*

We Concur:
Traynor, *C.J.*
McComb, *J.*
Tobriner, *J.*
Mosk, *J.*
Sullivan, *J.*

Dissenting Opinion by Peters, J.

Kesler v. Department of Motor Vehicles L.A. 29655.

I dissent.

Even if a demand to take all three tests be interpreted as a refusal to take any, under the law he could have agreed to take one, and could have demanded the right to take the other two if he paid for them (Veh. Code, § 13354, subd. (b)). The arresting officer should have informed petitioner of that right. Petitioner had made it perfectly clear that he wanted all three tests. The only way he could get them was to pay for two. The police officer presumably knew this. He knew or should have known that petitioner did not. Fundamental rules of fairness require that the officer inform him of those rights.

Peters, *J.*